Supreme Court, U.S.
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In The

Supreme Court of the United States

SELRAHC LIMITED PARTNERSHIP
and KATINA ROYE PEEVYHOUSE
(formerly known as KATINA R. ROYE),

Petitioners,

v.

SEECO, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners acquired title to severed mineral interests in real property derived from a valid tax deed issued in 1973. According to the decision appealed from in this case, the Arkansas Supreme Court issued opinions in 1983 and 1984, which "created" a rule of property and had the effect of divesting the Petitioners of title to their property, although Petitioners were not parties and did not receive notice of the proceedings in those cases. The question presented is:

Whether the lower court's ruling – which gave retroactive effect to Arkansas Supreme Court Opinions issued long after Petitioners acquired property through a valid and legal process at the time of acquisition, and therefore divested Petitioners of title to property – violated the takings provision of the Fifth Amendment and/or the Due Process provisions of the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners

The parties to this proceeding include the Petitioners, Selrahc Limited Partnership, and Katina Roye Peevyhouse, who filed a Petition to Quiet Title in Van Buren County, Arkansas. Petitioners do not include a publicly traded entity.

Respondents

Respondents are all persons who may potentially claim an interest in the real property under which Petitioners sought to quiet title, which include: Seeco, Inc.; New Century Production, L.L.C.; Willie J. Mansfield, a/k/a Wilbur J. Mansfield, if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns; Dana Mansfield; Farish Fraser, if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns; Gus H. Young, a/k/a Gus Young, if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns; Ronald Doll; Marianne Doll; Michael Morgan; Kathy Morgan; Stanley A. Grimm; Dorothy Jane Morgan, now Grimm; Clinton J. Muller; Marjorie M. Muller; Steven Stokes; W.W. Barrett and/or E.R. Barrett, if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns; Nicole Barrett; Patsy Jo Barrett; Allison

PARTIES TO THE PROCEEDING – Continued

Mansfield; Eric Mansfield; Shawn Mansfield; Michelle Mansfield; Katherine Joella Treibar; Sarah Jane Bell; Daniel John Muller; and Dorchester Minerals Operating, LP.

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The unpublished decision of the Arkansas Supreme Court, denying review of the Arkansas Court of Appeals' decision on Petitioners' Petition for Review, issued on April 15, 2010, is reprinted in the Appendix (App.) at App. 25. The decision of the Arkansas Court of Appeals, reprinted at App. 1, is published at *Selrahc Ltd. Partnership v. Seeco, Inc.*, 2009 Ark. App. 865, 2009 WL 4840206, ___ S.W.3d ___ (2009). The unpublished Final Judgment of the Circuit Court, incorporating the Summary Judgment Order dated February 2, 2009, filed March 11, 2009, is reprinted at App. 11. The Summary Judgment Order of the Circuit Court of Van Buren County, Arkansas issued February 2, 2009, is reprinted at App. 19, and is unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Opinion of the Arkansas Court of Appeals, following the denial of a Petition for Review to the Arkansas Supreme Court pursuant to 28 U.S.C. Section 1257. Under the Rules of the Supreme Court of the United States, as adopted on January 12, 2010, this Court has jurisdiction of this matter pursuant to Rule 10(c), where a state court of last resort, the Arkansas Supreme Court, denied review on April 15, 2010, of a decision and opinion of the Arkansas Court of Appeals filed December 16, 2009, which gives life to a 1984

Arkansas Supreme Court decision (which the Arkansas Legislature obviously intended to abolish) and which has the effect of divesting the Petitioners of their title to severed minerals in Van Buren County, Arkansas, conflicting with the Constitution of the United States and relevant decisions of this Court, particularly including the recent decision of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___ (2010). (*Id.* Rule 10(c)). This Petition for Writ of Certiorari is timely filed within 90 days from the date of the State Supreme Court's denial of review. Sup.Ct.R.13.

Pursuant to Rule 29.4(c), Rules of the Supreme Court of the United States, 28 U.S.C. § 2403(b) may apply, and therefore notification was given to the Arkansas Attorney General that a decision of the Arkansas Supreme Court and the Arkansas Court of Appeals has been challenged under the U.S. Constitution.

CONSTITUTIONAL PROVISIONS INCLUDED IN THE CASE

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioners legally acquired title to severed mineral interests in Van Buren County, Arkansas, derived from a deed issued to their predecessor in interest in 1973. Modern extraction methods and the general state of the oil and gas economy have recently made it economically desirable for oil companies to exploit the natural resources within Van Buren County, Arkansas, known as the "Fayetteville Shale" play.

The Petitioners, who have continually paid all ad valorem taxes on the property for over thirty years, commenced this action on May 20, 2008 in state court, seeking to quiet title to severed minerals acquired by tax forfeiture deed. According to the decision appealed from in this case, the Supreme Court of Arkansas issued opinions in 1983 and 1984, which "created" a new "rule of property," and retroactively divested Petitioners of title to the property, even though Petitioners were not parties, and were not given any form of notice to the proceedings. The effect of the decision in this case granted title to

persons who had absolutely no knowledge of any ownership claim or interest until 2003, when they were contacted by an oil company with a proposed oil and gas lease.

The only ground asserted by the Respondents for the conclusion that Petitioners' title was "void" was the allegation that the Van Buren County Assessor's office failed to "subjoin" mineral estate assessment records to the surface estate records. The trial court, and the Arkansas Court of Appeals each made the determination that they were "bound by precedent" to follow the Arkansas Supreme Court decisions of *Dawdy v. Holt*, 281 Ark. 171, 662 S.W.2d 818 (1984); and *Garvan v. Potlatch Corporation*, 278 Ark. 414, 645 S.W.2d 957 (1983), in finding that the rule of "subjoinder" applies – and because the Van Buren County Assessor's office did not maintain its records in 1973 in accordance with the subjoinder rule – as announced ten years after the sale, in 1983 – the tax deed was void.

The assessment records in Van Buren County were maintained and recorded in the same manner for both surface estates and severed minerals – indexed by section, township and range, for well over 100 years. This method was in place and in accordance with applicable state statutes at the time of the tax sale. The Arkansas Court of Appeals found that even though the method of maintaining tax assessment records in Van Buren County did not deprive the taxpayer of due process of law, and did not obscure information from the taxpayer, and did

not prejudice the taxpayer or burden an easy determination of his tax status at any given time, the additional "rule of subjoinder" as announced in the 1983 and 1984 *Garvan* and *Dawdy* opinions was not met – and title was therefore invalidated. Petitioners assert that the lower Court's decision itself effected an unconstitutional taking and deprived Petitioners of due process in violation of the Fifth and Fourteenth Amendments to the Federal Constitution.[1]

Although the trial court's opinion, and the earlier opinions of the Arkansas Supreme Court were challenged on constitutional grounds asserted herein, the Arkansas Court of Appeals found in this case that it was also bound by the earlier opinions of the Arkansas Supreme Court, and affirmed the decision of the trial court. A Petition for Review was timely filed with the Arkansas Supreme Court. The Court denied review, without opinion, by letter ruling dated April 15, 2010.

To understand the change in property law resulting from the decisions of *Garvan* and *Dawdy*, an examination of the origins of the "subjoinder" rule

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[1] These constitutional issues were raised by Petitioners in their briefs to the trial court and Arkansas Court of Appeals. When a state court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address the claim – even if first put forward in a petition for rehearing will not bar review by this Court. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___, 2010 WL 2400086 (2010).

is necessary. The basic concept of "subjoinder" first appeared in the leading case of *Sorkin v. Myers*, 216 Ark. 908, 227 S.W.2d 958 (1950), but significantly, it was not until the 1983 and 1984 cases of *Garvan* and *Dawdy* that "subjoinder" was announced as a blanket requirement in every case. In *Sorkin*, and in every Arkansas Supreme Court case dealing with the subject matter, until the *Garvan* opinion in 1983, the Court left open the fact that some counties in Arkansas may have maintained the assessment records in such a manner to permit a valid tax sale *without* "subjoinder" as a requirement. In *Sorkin,* the Court determined, under the facts presented in that case "that assessment methods, the manner of recording assessments, and faulty administrative procedure in dealing with the properties obscured the taxpayer of information that ought to have been conveniently accessible – [were] matters sufficiently prejudicial to require avoidance of the [tax] deeds [for severed mineral interests]." *Sorkin*, 327 S.W.2d at 958. The *Sorkin* court was clear in discussing the fact that multiple errors in the keeping of assessment records in that particular county violated the land owners' due process rights, stating:

> "[O]ur decision in all of the cases rests upon the proposition that the procedure legislatively intended was not followed. Instead, there was a course of well intentioned administrative conduct that deprived the property owners of the process provided for assessing and selling." *Sorkin*, 227 S.W.2d at 961.

In *Sorkin*, the Court found that because the Clerk's office listed the mineral interest in a separate book from the real estate records, *and* listed them alphabetically, it was only possible to look up the assessment of the mineral interest if the current holder's name was known. Otherwise, it was necessary to look through the entire alphabetical listing of over 4,000 names to discover the assessment. The surface estate listings were listed by section, township, and range numbers, and it was therefore possible to reference them by "land calls." Significantly, however, the mineral estates did not have such an index listing the assessments by land description. The Court found it significant that a land owner could not come to the office of the assessor and ascertain the status of the mineral interest by describing the section, township, and range in which the estate was located. Moreover, in the *Sorkin*, case, it was found that the assessment records, which had been kept in alphabetical order, had a number of occasions whereby a name search would be out of alphabetical order. The Court held, on the particular facts presented in that case, that the difference in treatment and difficulty of reference violated due process of law. Accordingly, because the assessment records were not "subjoined" to the surface, the tax sale was rendered void.

The circumstances in this case are clearly different from the principles announced by the Arkansas Supreme Court in *Sorkin*. As clearly stated by the Van Buren County Tax Assessor, the books containing

the surface estates and the mineral estates were maintained in the same bound volume, and each were indexed according to the section, township, and range, allowing a citizen to readily check the status of the assessment by a "land call" or description of section, township, and range. It is clear that the assessment records were kept in accordance with the applicable statutes, which were never struck down on any constitutional ground.[2] Thus, in Van Buren County, the "procedure legislatively intended *was*" followed and therefore met the "test" of *Sorkin*, 227 S.W.2d at 961.

It is clear from a reading of the Arkansas Supreme Court Opinions dealing with the development of the law of "subjoinder" that it was not until the cases of *Garvan v. Potlatch Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983); and *Dawdy v. Holt*, 281 Ark. 171, 662 S.W.2d 818 (1984), where the Court suddenly transformed the intended holding in *Sorkin*, which protected the due process rights of landowners, into a judicially defined and newly created rule, to require "subjoinder" of the mineral assessment records to the surface assessment records, regardless of any

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[2] The applicable state statutes in effect at the time of the tax sale were Ark. Stat. Ann. §§ 84-203, and 84-402. These statutes do *not* require "subjoinder," but instead, require the assessors to keep and maintain mineral assessment records separately, indexed by section, township, and range – exactly how the Van Buren County Assessor kept the assessment records. Ark. Stat. Ann. 84-402 appears in substantially the same form today as Ark. Code Ann. § 26-26-702.

due process concern. In other words, the Arkansas Supreme Court departed from precedent, and went from describing a reason for the rule (due process) in *Sorkin v. Myers* to a rule without reason – "subjoinder" in *Garvan v. Potlatch Corp.*, 278 Ark. 414, 645 S.W.2d 957, 958 (1983), where the Court ignored the due process rationale, evident from prior rulings, and issued an enlarged and rigid rule stated as follows: "when a separate assessment is made from mineral interests, the assessment must be 'subjoined' to the fee assessment." The *Garvan* opinion also provided a definition of the word "subjoined," just as the legislature creates definitions in statutes, whereby the definition is stated as follows:

> "The separate assessments must be listed individually, immediately after each fee or surface interest." *Garvan* at 958.

The problem with the *Garvan* opinion is that it rigidly created a new rule reciting an arbitrary, judicially determined "subjoinder" requirement. This rule was not required by the statutes in existence at the time of the Court's opinion, nor required by the case law or statutes at the time that Petitioners obtained their interest in the severed minerals, nor required by the case law or statutes at the time of the tax sale of the minerals involved in this case – approximately ten years prior to the *Garvan* opinion.

The decision which followed *Garvan* was *Dawdy v. Holt*, 281 Ark. 171, 662 S.W.2d 818 (1984), where the Court again abandoned the rationale for the

"subjoinder" requirement – that the tax assessments conform to the statutes and due process – and effectively announced the rule of "subjoinder" as a requirement, even if due process was otherwise satisfied. The Supreme Court, in *Dawdy*, recognized its ruling in *Garvan* went down a slippery slope, stating as follows:

> "Our cases have taken a clear direction for years in this matter and if any change is needed, as the Appellants suggest, **it is a matter for the legislature**."

Soon thereafter, the Arkansas General Assembly passed Act 961 of 1985 (now codified as Ark. Code Ann. § 26-26-1112), obviously intended to "cure" or abolish the effect of the *Garvan* and *Dawdy* opinions.[3]

It was asserted by Seeco, Inc., one of the Respondents in this matter, that the Supreme Court Opinions, including *Garvan* and *Dawdy*, "created" a new principle of property law. The trial court agreed and ruled that it was powerless to change the rule "created" by the Arkansas Supreme Court. App. 21. The trial court, in its ruling, stated in part as follows:

> "This Court notes that the Arkansas Supreme Court's early cases did discuss due

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[3] Ark. Code Ann. § 26-26-1112 states as follows: "County assessors may maintain separate records for severed mineral interests if the records are maintained by legal description of the surface estate in the same manner as records of the estates are maintained."

> process and the burden on the owners in its development of the principle requiring subjoined interest. **Subsequent case law failed to continue that line of reasoning.** The Supreme Court has simply looked to determine if there was subjoinder and if not it voided the deeds. As the Supreme Court has **created** this well established principal [sic] of property law, this Court lacks authority to change it." App. 21.

In the case below, Petitioners argued that if the decisions in *Garvan* and *Dawdy* were to be given effect (despite the enactment of Ark. Code Ann. § 26-26-1112) and if the trial court's decision in this case is permitted to stand, it would amount to an unconstitutional taking of Appellant's property in violation of the Arkansas and United States Constitutions. The Arkansas Court of Appeals disagreed, and simply stated that it was bound to follow precedent as established by the Arkansas Supreme Court, and affirmed the trial court's application of *Garvan* and *Dawdy* having the effect of invalidating Petitioners' title in their property. A Petition for Review was timely filed with the Arkansas Supreme Court, and the Arkansas Supreme Court denied review on April 15, 2010.

Accordingly, the Arkansas Court of Appeals gave "life" to the 1983 and 1984 decisions of the Arkansas Supreme Court by retroactively applying them to the 1973 tax sale, which effectively divested the Petitioners of their title in the property without due

process, and in violation of the Fifth and Fourteenth Amendment of the United States Constitution.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari in this case for compelling reasons. The effect of the lower court decision was to divest Petitioners of title, which they acted upon in paying all ad valorem taxes on the property for over thirty years, and effectively granted title to persons who had absolutely no knowledge of any claim of ownership until 2003; and based on the record, have never paid any ad valorem taxes. The decision affirmed by the Arkansas Court of Appeals disturbs basic constitutional rights of Petitioners. As stated in the case of *Ochoa v. Hernandez y Moralez*, 230 U.S. 139, 161 (1913):

> "Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

Such an attempt is unconstitutional and a violation of the state and federal constitutions. As recently confirmed by this Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___, 2010 WL 2400086 (June 17, 2010), "If a legislature *or a court* declares that what

was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." (emphasis original). *See also Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) (holding that constitutional rights cannot be nullified by action of state legislature, executive, or judicial officer).

The ruling and opinion of the Arkansas Court of Appeals in this case, together with denial of review by the Supreme Court of Arkansas constitute a "judicial taking," recognized to be unconstitutional by the recent case of *Stop the Beach Renourishment*, *supra*, and the case of *Chicago Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), where this Court explained as follows:

> "[A] state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form." *Id.* 166 U.S. at 234-235.

In this case, although the Petitioners were given an opportunity to be heard, within the general "form" of appropriate procedure, it is clear that the Courts addressing the determinative substantive issue in

this case, simply applied retroactively the 1983 and 1984 decisions which had departed from precedent and divested Petitioners of title without having the opportunity to be heard in those cases. Simply stated, the application of the arbitrary rule announced in *Garvan* and *Dawdy*, took property away from person "A," and gave it to person "B." Such act is an unconstitutional exercise of power. *See, e.g., Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___, 2010 WL 2400086 (June 17, 2010); *Calder v. Bull*, 3 U.S. 386, 388, 1 L.Ed. 648 (1798); *Cincinnati v. Vester*, 281 U.S. 429, 50 S.Ct. 360, 74 L.Ed. 950 (1930); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 251-52, 25 S.Ct. 251 (1905).

This case presents legal questions clearly analogous to, but factually different from the case of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___ (2010), U.S. Supreme Court No. 08-1151, in which this Court granted certiorari to address the question of whether the Florida Supreme Court's creation of "nonexistent rules of state substantive law" caused a "judicial taking" proscribed by the Fifth and Fourteenth Amendments to the United States Constitution. This case presents similar questions, and likewise merits review by this Honorable Court.

In the *Stop the Beach* case, the Petitioner discussed several opinions of this Court demonstrating that the concept of a "judicial taking" under circumstances analogous to the facts of this case is a

prohibited violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Such discussion included the case of *Hughes v. Washington*, 389 U.S. 290 (1967), wherein Justice Stewart opined that whether a "sudden change in state law, unpredictable in terms of the relevant precedents" could constitute a taking "inevitably presents a federal question" for determination by this Court. *Id.* 296-97. In determining whether such a sudden change in law has occurred, Justice Stewart stated:

> "For a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.*

Here, as in the *Hughes v. Washington* case, the Arkansas Supreme Court, similar to the Washington Supreme Court, created a new and unforeseeable change in property law when it abandoned the rationale and reason for the concepts of "subjoinder," and announced the requirement of "subjoinder" for a tax deed to be valid for the first time in *Garvan*, followed soon by *Dawdy*, many years after the Petitioners acquired their interest in the minerals. When the lower court gave effect to the *Garvan* and *Dawdy* opinions, despite the Arkansas legislature abolishment of the rule of "subjoinder," the result was an unconstitutional taking. *See Stop the Beach Renourishment*, *supra*, and *Chicago Burlington & Quincy R.R. Co.*, 166 U.S. at 233-34, 241.

The question in this case is similar to the question presented in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985), revised on procedural grounds, 477 U.S. 902 (1986), where the Ninth Circuit faced the question: "Can the state, by a judicial decision which creates a major change in property law, divest property interests?" 753 F.2d at 1471. The Ninth Circuit concluded that the "short answer is no." *Id.* at 1473. In making its conclusion, the Ninth Circuit discussed the fact that a state may change its laws by judicial or legislative action, but that the *application* of this judicial change *retroactively* was a "judicial taking" under *Hughes*, 389 U.S. at 295, and a violation of the United States Constitution. *Robinson*, 753 F.2d at 1474. The Ninth circuit held that the Plaintiffs could *not* be divested of their vested rights without the payment of compensation. The Arkansas Supreme Court's refusal to consider, and the Arkansas Court of Appeal's decision to retroactively apply the rule of subjoinder, as defined and created in *Garvan* and *Dawdy*, without regard to due process rationale as recognized in prior decisions, created a direct "judicial taking" in this case, expressly in conflict with the admonition of this Court in the recent opinion of *Stop the Beach Renourishment*, *supra*, creating a recognizable ground for granting this Petition for a Writ of Certiorari under Supreme Court Rules 10(b) and 10(c).

The Takings Clause of the Fifth Amendment applies not only when the government exercises its power of eminent domain to take ownership of private

property, but also when government action works to destroy an owner's property right or denies the owner any economically viable use of his property. *See* e.g. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___ (2010); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922); *Dolan v. City of Tigard*, 512 U.S. 374, 383-396 (1994). The Constitution protects private property owners not only from legislative and administrative actions that deprive them of their property without just compensation, but also from judicial actions that amount to such takings. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___ (2010). "No more by judicial decree than by legislative fiat" may private property be taken without due process and just compensation. *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of petition for writ of certiorari). Such judicial actions may include a departure from long-standing precedent. *Robinson v. Ariyoshi*, 441 F.Supp. 559 (D. Hawaii 1997), affirmed in relevant part, 753 F.2d 1468 (9th Cir. 1985), vacated on other grounds, 475 U.S. 902 (1986).

CONCLUSION

For all of the reasons identified herein, a Writ of Certiorari should issue to review the judgments of the Arkansas Supreme Court and the Arkansas Court of Appeals and, ultimately, to vacate those judgments

and render judgment that the Arkansas decisions resulted in an unconstitutional taking, or to remand the matter to the Van Buren County Circuit Court with instruction from this Court reversing the finding by the lower court that the Arkansas Supreme Court opinions may divest Petitioners of their property as a result of the "subjoinder rule"; or for continued proceedings consistent with due process to permit the Petitioner to continue his quiet title action or seek compensation for the taking; or to provide Petitioner with such other relief as is fair and just in the circumstances.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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July 2010

12/17/09

ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-378

SELRAHC LIMITED PARTNERSHIP and KATINA ROYE PEEVYHOUSE (formerly known as KATINA R. ROYE) APPELLANTS V. SEECO, INC., et al. APPELLEES	**Opinion Delivered** December 16, 2009 APPEAL FROM THE VAN BUREN COUNTY CIRCUIT COURT, [NO. CV2008-92] HONORABLE RHONDA K. WOOD, JUDGE AFFIRMED

DAVID M. GLOVER, Judge

The principal issue in this case is whether the tax sale of a severed mineral interest, not subjoined to the surface assessment, is valid. The circuit court found that the mineral interest had been assessed and forfeited improperly and quieted title in the appellees. We are thus confronted with the same situation in which we found ourselves when we decided *Blackburn v. Cline*, 8 Ark. App. 108, 650 S.W.2d 588 (1983). As in *Blackburn*, we affirm the circuit court.

Facts

Appellants Selrahc Limited Partnership and Katina Peevyhouse trace their claim to a November 1973 tax deed. The property was sold for 1970 taxes. One group of appellees, referred to as the "Morgan defendants" or "Morgan heirs," claim some of the mineral interests as the heirs of Quincy A. Morgan and Mabel May Morgan. The Morgan claim dates from 1923. Appellee Dana Mansfield, one of the grandchildren of Wilbur J. Mansfield, claims another part of the mineral interests. Appellee Seeco, Inc., is a producer who leases the mineral interests from the other appellees.

Appellants filed suit seeking to quiet title to the mineral interest in themselves. The petition asserted that appellants, or their predecessors in title, had paid all property taxes on the mineral interests since 1979, and that the Van Buren County Assessor had maintained the assessment records on the mineral interests by indexing them according to section, township, and range, making the mineral interests identifiable by tract. Appellants additionally sought to have Arkansas Code Annotated section 26-26-1112 (Repl. 1997), purporting to eliminate the subjoinder requirement, given retroactive application. Appellees filed separate answers to the petition in which they denied the material allegations. The Morgan heirs and the Mansfield heirs both filed counterclaims seeking to quiet title to their respective mineral interests in themselves.

Appellees also filed a motion for summary judgment that asserted that appellants' tax title was void as a matter of law.[1] In their brief in support of the motion, the Morgan heirs asserted that the Van Buren County Assessor did not maintain the mineral assessment records immediately following the same tract's surface assessment, and submitted an affidavit from Trina Jones, the current Van Buren County Assessor, to that effect. In response, appellants submitted Jones's deposition in which she stated that her affidavit was not entirely accurate. Jones testified that both the surface interests and the mineral interests are indexed in a single volume by section, township, and range. However, she indicated that the surface assessments are in one section of the book, while the mineral assessments are in a different section. As far as Jones knew, the mineral assessments had never been subjoined to their respective surface assessments.

The circuit court entered an order granting summary judgment to appellees. The court relied on the *Sorkin v. Myers,* 216 Ark. 908, 227 S.W.2d 958 (1950), line of cases and noted that this was a rule of property that the circuit court was without power to change. The court rejected appellants' invitation to apply Arkansas Code Annotated section 26-26-1112 retroactively, noting that the deeds at issue predated

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[1] The motion for summary judgment was filed by the Morgan heirs. It was adopted or supported by the other appellees.

the enactment of the statute. The court later entered a final judgment pursuant to Arkansas Rule of Civil Procedure 54(b). This appeal timely followed.

Standard of Review

Normally, we determine if summary judgment is proper based on whether evidentiary items presented by the moving party leave a material fact unanswered, viewing all evidence in favor of the nonmoving party. *Hisaw v. State Farm Mut. Auto Ins. Co.*, 353 Ark. 668, 122 S.W.3d 1 (2003). However, in cases such as this where the parties do not dispute the essential facts, we simply determine whether the moving party was entitled to judgment as a matter of law. *Jackson v. Blytheville Civ. Serv. Comm'n*, 345 Ark. 56, 43 S.W.3d 748 (2001).

Arguments on Appeal

1. Subjoinder Requirement

Appellants first argue that the circuit court erred in finding their tax deed void because the manner in which the Van Buren County Assessor maintained its records did not deprive the original owners of due process. As appellants point out, the first mention of the requirement that the mineral interest be listed immediately below, or subjoined to, the surface interest is found in *Sorkin, supra*. There, the supreme court said mineral interests had been listed in a special book with the names of the owners listed alphabetically. The court noted that a deputy in the

county clerk's office had testified that it was not possible to find a particular mineral interest in the book without checking the entire list of almost four thousand names, and that this resulted from the fact that there was no order or system with reference to the land calls. The court then observed that Ark. Stat. Ann. § 84-402, now codified as Ark. Code Ann. § 26-26-702 (Repl. 1997), provides that the county clerk shall make and deliver to the assessor, in books prepared for that purpose, an abstract of lands; that in listing acreage he shall commence with the lowest number of township and range in the county, and in the northeast corner of each township; and that he shall then proceed numerically with all the sections, townships, and ranges. After calling attention to the statutes dealing with the assessment of mineral and timber interests severed from the fee, the court stated:

> The minerals, being primarily an interest in the land, are severable *only* because the legislative authority has made them so; yet for taxing purposes they are so closely related to the realty that ownership identification and accuracy make it well-nigh imperative that the mineral listings be subjoined to the land assessments.

216 Ark. at 912, 227 S.W.2d at 960 (emphasis in original).

Appellants argue that the *Sorkin* court did not state that subjoining was absolutely necessary and that its holding was really based on the fact that the

listing procedures used made it difficult to find the assessment status of any particular mineral interest. Some support for that position can be found in *Davis v. Stonecipher,* 218 Ark. 962, 239 S.W.2d 756 (1951), the next case that considered the matter. The *Davis* court held a tax title void, noting that the same erroneous method of arranging the names of the owners alphabetically, rather than arranging the land by section, township, and range, existed in that case. Nothing was said in that case about the necessity of subjoining the mineral listing to the surface assessment, and again, nothing was said about such a requirement in *Smiley v. Thomas,* 220 Ark. 116, 246 S.W.2d 419 (1952). The requirement, however, was mentioned in *Steinbarger v. Keever,* 219 Ark. 411, 242 S.W.2d 713 (1951), although the opinion indicates that the real vice in the assessment procedure may have been the failure to list the mineral interests in the order of section, township, and range. In *Adams v. Bruder,* 275 Ark. 19, 627 S.W.2d 12 (1982), there is a more definite requirement of subjoining, but the opinion notes that the mineral interests were not listed by section, township, and range. The supreme court followed *Adams* in *Hurst v. Rice,* 278 Ark. 94, 643 S.W.2d 563 (1982). In *Walker v. Western Gas Co.,* 5 Ark. App. 226, 635 S.W.2d 1 (1982), we held that the case was controlled by *Adams.*

In *Blackburn, supra,* the mineral interest was forfeited for 1931 taxes. The mineral interests were listed by section, township, and range in the same book as the surface interests. The appellants in that

case argued, as appellants do here, that subjoinder was not absolutely required by the statutes. Nevertheless, we affirmed, stating:

> We recognize the force of the appellants' argument. . . . But we are faced with two problems. First, we do not agree that the present-day regulations of the Assessment Coordination Division can affect the assessment of mineral interests in 1931. Second, even if we agreed with the appellants' argument as to the effect of the cases discussed above, we are faced with the Arkansas Supreme Court decision of *Garvan v. Potlatch Corporation,* 278 Ark. 414, 645 S.W.2d 957 (1983).
>
> In that case the court cited three of the cases discussed above, *Adams, Steinbarger,* and *Sorkin,* and said, "Those cases all hold that when a separate assessment is made for mineral interests, the assessment must be 'subjoined' to the fee assessment." The opinion defines the word "subjoined" and states, "The separate assessments must be listed individually immediately after each respective fee or surface interest." Thus, the question of whether the subjoining of surface and mineral rights is absolutely necessary is not open for us to decide in this case.

8 Ark. App. at 110-11, 650 S.W.2d at 590. This language is equally applicable to the present case.

After our opinion in *Blackburn,* the supreme court addressed and rejected an argument similar to

the one appellants make here, that subjoinder is not required where the mineral interests were listed separately, but also were listed by section, township, and range. *Dawdy v. Holt,* 281 Ark. 171, 662 S.W.2d 818 (1984). The court stated:

> The appellants also point out that, unlike the case in *Sorkin,* the assessment method used did not deprive the taxpayer of due process of law, obscure the information from the taxpayer, prejudice the taxpayer, or burden an easy determination by an owner of his tax status at a given time. Our cases have taken a clear direction for years in this matter and if any change is needed, as the appellants suggest, it is a matter for the legislature.

281 Ark. at 174, 662 S.W.2d at 819.

As part of this point, appellants also argue that the supreme court's departure from a due-process rationale for the subjoinder rule in *Dawdy* and *Garvan* constitutes an unconstitutional violation of the separation-of-powers doctrine. However, the issue is not preserved for our review because the circuit court did not clearly and specifically address the issue. To preserve an argument for appeal, even a constitutional one, the appellant must obtain a clear ruling below. *Doe v. Baum,* 348 Ark. 259, 72 S.W.3d 476 (2002).[2]

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[2] We have considered the authorities contained in appellants' post-argument motion to cite additional authorities

(Continued on following page)

2. Retroactive Application of Section 26-26-1112

In their second point, appellants argue that section 26-26-1112 should be retroactively applied to the present case because it was in effect at the time the circuit court made its decision. The legislature accepted the supreme court's invitation in *Dawdy* and enacted Act 961 of 1985, now codified at Ark. Code Ann. § 26-26-1112, which provides that "[c]ounty assessors may maintain separate records for severed mineral interests if the records are maintained by legal description of the surface estate in the same manner as records of the estates are maintained."

The supreme court acknowledged section 26-26-1112 in *Gilbreath v. Union Bank,* 309 Ark. 360, 830 S.W.2d 854 (1992), but declined to apply it retroactively. We, like the circuit court, cannot overrule a decision of the Arkansas Supreme Court. *Osborne v. Bekaert Corp.,* 97 Ark. App. 147, 245 S.W.3d 185 (2006). We also cannot ignore the fact that the tax forfeiture at issue occurred in 1970, long before section 26-26-1112 was enacted. *Gilbreath* involved an assessment and forfeiture that occurred in 1981. Moreover, this court in *Blackburn* refused to apply an administrative regulation similar to section 26-26-1112 to a 1931 tax assessment.

Appellants also argue that section 26-26-1112 was a "curative act" designed to overcome the

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on this issue. However, we are not persuaded that the issue is preserved.

subjoinder problem. The issue is whether the legislature intended it to be a curative act. Surely it had this issue in mind, given the fact that the act was passed in such close proximity to the supreme court's *Dawdy* decision, and *Dawdy* invalidated a tax deed. On the other hand, if the legislature had intended the act to have retroactive application so as to render tax deeds valid, it could easily have said so.

3. Equitable Arguments

For their third point, which they characterize as an alternative basis, appellants argue that principles of equity and estoppel preclude appellees from defeating their record title. The basis for the argument is that appellees have acknowledged that they have not paid property taxes on the mineral interests for more than thirty years. The supreme court rejected this very argument in *Adams, supra.*

Affirmed.

GLADWIN and BROWN, JJ., agree.

IN THE CIRCUIT COURT OF
VAN BUREN COUNTY, ARKANSAS
CIVIL DIVISION

SELRAHC, Limited Partnership; and
KATINA R. PEEVYHOUSE (formerly known as KATINA R. ROYE); PLAINTIFFS

Vs. Case No. CV-2008-92 (5th Division)

SEECO, INC.,; and NEW CENTURY PRODUCTION, LLC, WILLIE J. MANSFIELD, a/k/a WILBUR J. MANSFIELD, if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns of WILLIE J. MANSFIELD; a/k/a WILBUR J. MANSFIELD; DANA MANSFIELD; FARISH FRASER, if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns of FARISH FRASER; GUS H. YOUNG a/k/a GUS YOUNG if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns of GUS H. YOUNG, a/k/a GUS YOUNG RONALD DOLL; MARIANNE DOLL; MICHAEL MORGAN; KATHY MORGAN; STANLEY A. GRIMM; DOROTHY JANE MORGAN; NOW GRIMM; CLINTON J, MULLER MARJORIE M. MULLER STEVEN STOKES; WW. BARRETT

and/or E.R. BARRETT if he is living, or if he is deceased, then the unknown heirs, executors, administrators, devisees, trustees and assigns of W.W. BARRETT and/or E.R. BARRETT; NICOLE BARRETT; PATSY JO BARRETT; ALLISON MANSFIELD; ERIC MANSFIELD; SHAWN MANSFIELD; DANA MANSFIELD; ;MICHELLE MANSFIELD; KATHERINE JOELLA TREIBAR; SARAH JANE BELL; DANIEL JOHN MULLER; DORCHESTER MINERALS OPERATING, LP DEFENDANTS

FINAL JUDGMENT DISMISSING CLAIMS OF PLAINTIFFS PURSUANT TO THE COURT'S ORDER GRANTING SUMMARY JUDGMENT FILED ON FEBRUARY 2, 2009, STRIKING PLAINTIFFS' SECOND AMENDED PETITION, MAKING DIRECTIONS REGARDING INTERPLED FUNDS AND RETAINING JURISDICTION OF OTHER ISSUES

Now on this 4th day of ~~February~~ March, 2009, comes on to be heard the captioned matter pursuant to the Court's Order granting summary judgment filed on February 2, 2009, and based upon all matters of record the Court enters this judgment.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that:

1. This judgment is entered with reference to the claims of the Plaintiffs, SELRAHC, Limited Partnership and Katina R. Peevyhouse (formerly known as Katina R. Roye), to the ownership of mineral interests in the hereinafter described tracts of real property located in Van Buren County, Arkansas, as identified in the Petitions of the Plaintiffs:

> An undivided one-half interest in the Southwest Quarter of the Southeast Quarter (SW/4 SE/4) of Section 27, Township 10 North, Range 17 West;
>
> An undivided one-half interest in the South half of the North half (S/2 N/2) of Section 33, Township 10 North, Range 16 West;
>
> An undivided one-half interest in the South half of the North half (S/2 N/2) of Section 29, Township 10 North, Range 17 West;
>
> An undivided one-half interest in the North half of the Southeast Quarter (N/2 SE/4) of Section 35, Township 10 North, Range 17 West;
>
> An undivided one-half interest in the South half of the Northwest Quarter (S/2 NW/4) of Section 31, Township 10 North, Range 16 West;
>
> An undivided one-half interest in Section 33, Township 10 North, Range 17 West;

An undivided one-half interest in the North half of the South half (N/2 S/2) of Section 33, Township 10 North, Range 16 West;

An undivided one-half interest in the South half (S/2) of Section 25, Township 10 North, Range 17 West; and

An undivided one-half interest in the Southwest Quarter (SW/4) of Section 35, Township 10 North, Range 17 West.

2. For the reasons set forth herein, and in the Court's Order filed on February 2, 2009, the Plaintiffs' claims to the ownership of the mineral interests in the real property described in paragraph 1 above are hereby dismissed with prejudice.

3. The Court finds that the invalidity of Plaintiffs' of claims based upon a void tax sale deed constitute a common defense for all Defendants in this litigation. Plaintiffs' Petition and Amended Petition repeatedly acknowledged that multiple Defendants may claim an interest in certain minerals or lands claimed by the Plaintiffs. The timely filed answers and responsive pleadings of Separate Defendants Dana Mansfield, the "Morgan Defendants", and Seeco, Inc. specifically denied Plaintiffs' allegations of mineral ownership. The "Morgan Defendants" filed a Motion for Summary Judgment asserting the invalidity of the tax sale deed upon which the Plaintiffs' rely. The Defendant Dana Mansfield, having filed a Motion for Declaratory Judgment, gave notice of adoption of the Morgan Defendants' Motion for

Summary Judgment and Brief in Support thereof, Similarly, Defendant Seeco, Inc. filed a legal memorandum in support of the Morgan Defendants' Motion for Summary Judgment. All said pleadings base their defenses upon the invalidity of the tax deed on which the Plaintiffs rely. The Court finds that said defense constitutes a common defense for all Defendants in this litigation, and therefore, all Defendants are entitled to the benefit thereof.

4. The Plaintiffs' Second Amended Petition, filed on January 30, 2009, merely adds additional parties Defendant and, otherwise, presents the previous claims to mineral ownership determined to be invalid. The provisions of the Court's Order filed on February 2, 2009, renders Plaintiffs' Second Amended Petition moot, and therefore, it is hereby stricken from the record pursuant to Rules 12(f) and 15(a) of the Arkansas Rules of Civil Procedure.

5. Pursuant to an Order of this Court entered on December 9, 2008, more than $325,000.00, is currently held in the registry of the Court. By representation of the parties, Section 33, Township 10 North, Range 16 West is the only subject property currently producing oil, natural gas, or other minerals in paying quantities, and the amounts currently held in the registry of the Court represent suspended royalties from said production. In the event any party files a Notice of Appeal and perfects said appeal, the Clerk of the Court shall retain the funds (and any subsequent funds placed therein) subject to further orders of this Court and the directions of the

Arkansas appellate courts. If, within the time permitted by law, a notice of appeal from this final judgment is not filed, or is not otherwise perfected, any party may petition the Court for an order directing payment of a portion of said funds.

6. The Court retains jurisdiction of this action for the purpose of considering counterclaims and cross claims for the quieting of title to the subject real properties and other issues properly presented. However, as to the claims of the Plaintiffs to the ownership of mineral interests in the real properties identified in paragraph 1 above, this judgment represents the final judgment of the Court.

/s/ Rhonda Wood
Honorable Rhonda K. Wood

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment, the Court finds:

1. The claims of the Plaintiffs to ownership of mineral interests in the real properties identified in the Plaintiffs' pleadings and in the foregoing judgment are based on the same tax sale deed. That tax sale deed has been determined to be void and the further arguments of the Plaintiffs have been rejected for the reasons set forth in the Court's Order filed on February 2, 2009. That decision is final and has been determined after full opportunity for the Plaintiffs to

present evidence and argument. The addition of additional Defendants would not add to the claims of the Plaintiffs.

2. It would be unfair to delay the outcome of this proceedings [sic] before this Court and to delay any possible appeal of this Court's judgment for the adding of additional Defendants to this litigation. Recent title work as to Section 33, Township 10 North, Range 17 West has prompted the Plaintiffs to propose a Second Amended Petition which would add other defendants. Based on the representations of the parties Defendant, title work has not been completed in several of the sections of real property identified in the Plaintiffs' pleadings and in this judgment; therefore, there is a possibility that further title work would necessitate the addition of even further Defendants and further delay the ultimate disposition of Plaintiffs' claims.

3. There are substantial sums of money which should be paid to the royalty owners legitimately entitled to that money and it would be unfair and unreasonable to delay the payment of royalties owed regarding gas production from one section of real property as to which natural gas production currently exists by the continued amendment of the pleadings to add additional defendants as to sections of real property which are not yet in production and as to which title work has not been accomplished.

Upon the basis of the foregoing factual findings, the court hereby certifies in accordance with Rule

54(b)(1), Ark. R. Civ. P., that it has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the judgment shall be a final judgment for all purposes.

Certified this 4th day of ~~February~~ March, 2009.

/s/ Rhonda Wood
Honorable Rhonda K. Wood

IN THE CIRCUIT COURT OF VAN BUREN COUNTY, ARKANSAS
54th DIVISION

SELRAHC, LIMITED PARTNERSHIP; AND KATINA R. PEEVYHOUSE **PLAINTIFF**

v. **No. CV-2008-92**

SEECO, et al. **DEFENDANTS**

ORDER GRANTING SUMMARY JUDGMENT

The court heard the Defendants' Motion for Summary Judgment on Plaintiff's Petition was heard on December 9, 2008. The Defendants included in this Motion are Seeco, Dana Mansfield (including the heirs or beneficiaries of Wilbur Mansfield or Loran Alan Mansfield), Morgan Defendants (Dana Mansfield, Ronald Doll, Marianne Doll, Michael Morgan, Kathy Morgan, Stanley A. Grimm, Dorothy Jane Grimm, Clinton Muller, Steve Stokes, Sara Jane Bell, and Daniel John Muller), and E.R. Barrett, Jr.

The undisputed facts of the case are as follows:

Plaintiffs contend they are the owners of mineral rights on certain described real property lying in Van Buren County, which is the subject "Property" as described in the Complaint. The Plaintiffs obtained Mineral Deeds to the Property which were filed on January 17, 1979. These Mineral Deeds were ultimately derived from a Deed of Tax Sale dated November 2, 1973. Plaintiffs have continually paid all

county property taxes since the date of obtaining the deeds.

Defendants jointly are either original predecessors in title to the Plaintiffs' Mineral Deeds, their heirs and assigns, or Lessors of mineral rights on the Property. During the 1970s, the Van Buren County Tax Assessor listed mineral rights separate from real, estate (surface ownership). The parties do not controvert that the ownership rights were maintained in one book. The book listed all the surface ownerships followed by a divider labeled "Minerals", which in turn listed all of the mineral right ownerships.

Summary judgment is appropriate under Ark. R. Civ. P. 56, when no genuine issue of material fact exists. *Crawford v. Lee County School District,* 64 Ark. App. 90 (1998). In the present case, the Court finds that there is no genuine issue of material fact as to when Plaintiff. The parties agree that all material facts are uncontroverted. The question in this case is truly a question of law.

The only issues before the Court in this Motion for Summary Judgment are whether the original tax deeds are void under Arkansas Law and whether the court should retroactively apply A.C.A. 26-26-1112.

The Arkansas Supreme Court has a well established principle of property law that mineral listings must be subjoined to the land assessments. If the county failed to subjoin the mineral rights, then the county lacked the authority to sell the mineral rights.

The Court has repeatedly held that deeds obtained where there was no subjoinder of rights are void.

Defendants contend that since this was in fact the case in Van Buren County, the Plaintiffs' deeds are void. Plaintiffs argue that this is not a bright line test, but rather a policy of protecting the due process rights of landowners. Their argument is that as long as the various mineral and surface ownership rights are listed in a manner that does not place a burden on the owners to determine their interest, then the deeds are not void. They contend there was no burden in the case since the interests were listed in the same book.

This Court notes that the Arkansas Supreme Court's early cases did discuss due process and the burden on the owners in its development of the principle requiring subjoined interest. Subsequent case law failed to continue that line of reasoning. The Supreme Court has simply looked to determine if there was subjoinder and if not it voided the deeds. As the Supreme Court has created this well-established principal of property law, this court lacks the authority to change it.

The Plaintiffs' next contention is that the legislature recognized the fact that many Arkansas counties did not subjoin land interests. Therefore, many individuals obtained mineral deeds through tax sales and paid the taxes for decades only to discover the deeds were void. The legislature enacted A.C.A. 26-26-112 [sic] that provided "County assessors may

maintain separate records for severed mineral interests . . . " This Court declines to apply the statute retroactively. The Arkansas Supreme Court had the opportunity to make a retroactive application in *Gilbreath v. Union Bank*, 309 Ark. 360 (1992), but did not and instead noted the legislation's effective date was 1985 and the deeds in that case were in 1981. Likewise, the deeds in the present case predated the legislation.

This court grants the Defendants' Motion for Summary Judgment on Plaintiff's Petition and finds that all Plaintiffs' mineral deeds obtained in the 1970s in Van Buren County concerning these Defendants' "Property" as described in the complaint are void. Therefore, the Plaintiffs' have no interest in the "Property's" mineral rights.

This Court notably did not include the property descriptions in this Order. When the Court referred to "Property" it meant all of the legal descriptions as listed in Plaintiffs' Complaint (as referenced to: Seeco, Dana Mansfield, Morgan Defendants (Dana Mansfield, Ronald Doll, Marianne Doll, Michael Morgan, Kathy Morgan, Stanley A, Grimm, Dorothy Jane Grimm, Clinton Muller, Steve Stokes, Sara Jane Bell, and Daniel John Muller), and E.R. Barrett, Jr.) as the Court denies Plaintiffs' complaint in its entirety as to these Defendants. In Order to have an accurate listing of each Defendants' interests in order to effectively quiet title, the Court requests that counsel for the Defendants present a joint precedent on their respective Quiet Title counter-claims to the Court for approval.

The Court additionally notes that the Plaintiff filed several Motions to Extend time for Service. The Court has been generous to allow extensions for service and responses to Motions. The final Motion to Extend Service that the court signed will end service on Jan. 31, 2009, although the Plaintiff has requested additional time. The Plaintiff contends this Motion for Summary Judgment was not ripe until all Defendants were served and answered or in default, however, the Plaintiff admits that there has been constructive service on all Defendants. The Plaintiff could not bring forth any argument that an additional Defendant could bring that would alter the outcome of this Motion. If the Plaintiff's deeds are void under Arkansas law, they will be void to all Defendants. Therefore, there is no reason to justify depriving these Defendants the substantial benefits of their property rights. The Clerk of the Court is holding a substantial sum of money in lease payments; in excess of a hundred thousand of dollars. While additional Defendants may result in separate orders, that small inefficiency does not outweigh these Defendants' entitlement to protection of their property rights. Thus, by this ruling the Court determines that the Summary Judgment was ripe in regards to these Defendants.

IT IS SO ORDERED.

/s/ Rhonda Wood
Rhonda K. Wood

File for record on this 2 day of Feb.,
2009 at 1:23p.m. and the same is
now duly recorded in Circuit court
record Book 555, on page 595
_____ ESTER BASS,
Clerk By: /s/ [Illegible] D.C.

Leslie W. Steen
Clerk

Office of the Clerk
Supreme Court of the
State of Arkansas
Arkansas Court
of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas
72201

April 15, 2010

Joe Dan Byars, Jr.
Christian & Byars
502 Garrison Avenue
Post Office Box 1725
Fort Smith, AR 72902

RE: 09 01412. Selrahc Limited Partnership et al. v. Seco, Inc. et al.

Dear Mr. Byars:

The Arkansas Supreme Court made the following order today in the above styled case:

"Petition for review is denied."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:jko
cc: Kent Tester
Charles Morgan
Jerry Canfield
Jonathan Beck

Donald E. Prevallet
Bob Honea
John W. Grimm
Stanley A. Grimm
Mark Moll
Joe Barrett
James W. Smith
Mary Ann Westphal
Wendell P. Martens, Jr.
Ester Bass, Clerk
(CV-08-92)

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No. 10-69

In The
Supreme Court of the United States

SELRAHC LIMITED PARTNERSHIP
and KATINA ROYE PEEVYHOUSE
(formerly known as KATINA R. ROYE),

Petitioners,

v.

SEECO, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Arkansas

BRIEF OF RESPONDENT, SEECO, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

The parent corporation of SEECO, Inc. is Southwestern Energy Company, which owns 100% of the stock of SEECO, Inc. Southwestern Energy Company is publicly traded. No publicly held company owns 10% or more of the stock of Southwestern Energy Company.

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STATEMENT OF THE CASE

Petitioners, who claim to own severed mineral interests in Van Buren County, Arkansas, filed this action below seeking to quiet title to their purported ownership, which was based upon a 1973 tax sale deed. App. 13, 16, and 19. Respondents asserted the tax sale deed was void under Arkansas law and moved for summary judgment dismissing Plaintiffs' claim of ownership. App. 14 and 20. The trial court noted the well established principle of Arkansas property law requiring subjoinder of assessments of severed mineral interests to the assessments of the corresponding surface interests and, that in the absence of subjoinder, any tax sale deed was void. App. 20-21. Since the Van Buren County tax assessment records in the 1970's did not subjoin severed mineral assessments to surface assessments, the trial court granted summary judgment to the Respondents and dismissed Petitioners' claim of ownership of the severed mineral interests. App. 22.

By Act 961 of 1985, the Arkansas legislature, for the first time, allowed tax assessors to maintain separate records for severed mineral interests if those records are maintained by legal description of the surface estate in the same manner as surface records are maintained. Ark. Code Ann. § 26-26-1112 (Repl. 1997). Based upon Arkansas Supreme Court precedent, the trial court refused to retroactively apply the newly permissive method of assessment. App. 21-22.

Petitioners appealed to the Arkansas Court of Appeals. *Selrahc Ltd. Partnership v. SEECO, Inc.*, 2009 Ark. App. 865, 2009 WL 4840206, ___ S.W.3d ___ (2009). The Court of Appeals applied the same long-standing rule of Arkansas property law, rejecting Petitioners' claim of ownership of the severed mineral interests and holding that the tax sale deed relied upon by Petitioners was void. App. 1 (discussion following at App. 2-8). The Court of Appeals likewise rejected Petitioners' argument for retroactive application of Ark. Code Ann. § 26-26-1112. App. 9-10. The Court of Appeals did not rule upon Petitioners' claimed "unconstitutional violation of the separation-of-powers doctrine" as that issue was not preserved for review under established Arkansas procedure. App. 8.

The Petitioners filed a Petition for Review with the Arkansas Supreme Court (the Petition for Review is printed in the attached Respondent's Appendix 1-4). The Petition for Review makes no mention of the Fifth Amendment and Fourteenth Amendment protections against deprivation of property without due process of law on which Petitioners rely in their Petition for Writ of Certiorari. Petition at 2-3. The Petition for Review asserts the Arkansas legislature's adoption of Act 961 of 1985 was controlling Arkansas law and "any decision now failing to give effect to such statute creates an unconstitutional violation of the separation of powers doctrine." Resp. App. 3. The Arkansas Supreme Court denied Petitioners' Petition for Review. App. 25.

Petitioners' Petition for Writ of Certiorari ensued.

ARGUMENT

Respondent, SEECO, Inc., hereinafter referred to as "SEECO," respectfully suggests the Petition for Writ of Certiorari should be denied. Petitioners' argument that a taking of property has occurred as a result of decisions of the Arkansas courts has not been sufficiently pressed or passed upon by the Arkansas courts to justify review by this Court. Also, Petitioners have failed to comply with Supreme Court Rule 14(1)(g)(i). Additionally, there is no substantive merit to Petitioners' argument. Petitioners' claim of ownership of the severed mineral interests is based upon a tax sale deed which is void pursuant to established Arkansas law. Petitioners' assertion that the Arkansas courts changed Arkansas law subsequent to Petitioners' acquisition of the tax sale deed is incorrect and should be rejected. Finally, the dismissal of Petitioners' claim below resulted from a summary judgment limited to the void tax sale deed issue. Additional defenses to the purported validity of the tax sale deed based upon due process principles as espoused in this Court's decision in *Jones v. Flowers*, 547 U.S. 220 (2006) remain.

I. THIS COURT SHOULD DENY PETITIONERS' PETITION FOR CERTIORARI BECAUSE THE ASSERTED FEDERAL QUESTION IS NOT PROPERLY BEFORE THIS COURT.

The Petition for Writ of Certiorari should be rejected because the unconstitutional taking of property argument was never pressed or passed upon by the Arkansas courts. As a consequence, Petitioners have failed to comply with the Rules of this Court requiring specific references to the record where the federal constitutional question was timely and properly raised.

A. Petitioners' assertion of an unconstitutional taking of their property in violation of the Fifth and Fourteenth Amendments was not pressed or passed upon by the Arkansas Courts and, therefore, cannot be considered by this Court.

While Arkansas law permits the severing of mineral interests from surface estates and the separate assessment of the severed mineral interests for tax purposes, tax sale deeds of severed mineral interests are void if the tax assessments of the severed mineral interests were not subjoined to the corresponding assessments of the surface estates. *Sorkin v. Myers*, 216 Ark. 908, 911, 227 S.W.2d 958, 960 (1950). In *Sorkin*, the Arkansas Supreme Court declared:

> The minerals, being primarily an interest in the land, are severable only because the legislative authority has made them so; yet for taxing purposes they are so closely related to the realty that ownership identification and accuracy make it well-nigh imperative that the mineral listings be subjoined to the land assessments. Any method that destroys this unilateral relationship burdens ready determination when an owner seeks information respecting the status of his interest at a given time.

216 Ark. at 912, 227 S.W.2d at 960.

Petitioners' purported tax title is derived from a 1973 tax sale deed. App. 19. Petitioners argue that the Arkansas courts' application of the subjoinder rule created a judicial taking of Petitioners' claimed mineral interest. Petition at 16. Petitioners' unconstitutional takings issue, however, was not "pressed or passed upon" by the state courts. Because Petitioners' federal constitutional argument was not properly presented or addressed by the trial court, the Arkansas Court of Appeals or the Arkansas Supreme Court, this Court should decline to review Petitioners' claims.

This Court has long adhered to the practice of not hearing questions which were not presented or decided in the court whose judicial action is under review and which are raised here for the first time. *See Clark v. Arizona*, 548 U.S. 735, 765 (2006); *Howell v. Mississippi*, 543 U.S. 440, 443 (2005);

Adams v. Robertson, 520 U.S. 83, 86 (1997); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988); *Buchanan v. Kentucky*, 483 U.S. 402, 404, footnote 1 (1987); *Illinois v. Gates*, 462 U.S. 213, 218-19 (1983); *Webb v. Webb*, 451 U.S. 493, 495-97, 499 (1981); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); *Whitney v. California*, 274 U.S. 357, 360 (1927); *Crowell v. Randell*, 35 U.S. 368, 398-99 (1836). In *Crowell*, this Court stated that it was without jurisdiction unless a federal question had been both raised and decided in the state court below. 35 U.S. at 392. This practice is often characterized as the "not pressed or passed upon below" rule. This Court has not always been absolutely consistent in the characterization of the "not pressed or passed upon below" rule with early cases treating the rule as jurisdictional, while more recent opinions view the rule as a prudential restriction which does not pose an absolute restriction to this Court's review. *Bankers Life & Casualty Co.*, 486 U.S. at 79. However, it is not necessary to characterize the rule here, because, assuming the rule is prudential, the more prudent course of action for the Court is to decline to review Petitioners' claim.

The "not pressed or passed upon below" rule is derived from 28 U.S.C. 1257(a). Under that statute, this Court has almost always refused to review a state-court decision based upon federal grounds unless the federal claim was either addressed by or

properly presented to the state court whose judgment is under review. *Howell*, 543 U.S. at 443 (*citing Adams v. Robertson*, 520 U.S. 83, 86 (1997)). The "not pressed or passed upon below" rule requires, at a minimum, that "there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim in the time and in the manner *required by the state law*." *Webb*, 451 U.S. at 501 (emphasis added).

This Court has enumerated various reasons for the "not pressed or passed upon below" rule. First, the record is likely to be inadequate if the federal question at issue was not properly presented at the state court level. *Gates*, 462 U.S. at 221 (1983) (*citing Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969)). In addition, principles of comity require that state courts be given the opportunity to perform their duties, which include construing and applying the applicable federal requirements. *Webb*, 451 U.S. at 499. Finally, by requiring that litigants first properly present federal claims to the state courts and giving those courts an opportunity to decide those claims, the state court is permitted "to rest its decision on an adequate and independent state ground." *Gates*, 462 U.S. at 222.

Petitioners' asserted Federal Constitution violation was not "pressed or passed upon" by the Arkansas courts. Petitioners state that "[t]hese constitutional issues were raised . . . in their briefs to the

trial court and the Arkansas Court of Appeals." Petition at 5, footnote 1. Petitioners do not provide "pertinent quotations of specific portions of the record" as required by Supreme Court Rule 14(1)(g)(i). As reflected by SEECO's brief to the Arkansas Court of Appeals, Petitioners below merely mentioned the asserted constitutional issue in their pleadings to the trial court and did not develop the issue factually or legally but, to the contrary, advised the trial court that the involved issues at the summary judgment motion hearing were limited to (1) distinguishing prior subjoinder cases and (2) a contention for retroactive application of Arkansas Act 961 of 1985. *See* Resp. App. 5-8. The Arkansas Court of Appeals identified the issue, in part, as a state law "separation-of-powers doctrine" issue, and found the issue was not preserved for review because the trial court did not clearly and specifically address the issue. App. 8.

Arkansas law requires Petitioners to fully and completely develop all issues before the trial court. *Rounsaville v. State*, 372 Ark. 252, 258-59, 273 S.W.3d 486, 492 (2008); *Eastin v. State*, 370 Ark. 10, 16-18, 257 S.W.3d 58, 63 (2007); *Raymond v. State*, 354 Ark. 157, 162-68, 118 S.W.3d 567, 571-74 (2003). Well established Arkansas caselaw specifically requires that constitutional arguments must be raised and fully developed in the trial court. *Raymond*, 354 Ark. at 162, 118 S.W.3d at 571. Moreover, Petitioners had the burden of obtaining from the trial court a clear ruling on all issues presented for appeal, and undecided questions could not be relied upon on appeal.

Miskelley v. State, 323 Ark. 449, 471, 915 S.W.2d 702, 714, *cert. denied*, 519 U.S. 898 (1996); *Bowen v. State*, 322 Ark. 483, 502, 505, 911 S.W.2d 555, 564, 565 (1995), *cert. denied*, 517 U.S. 1226 (1996). The Arkansas Supreme Court has repeatedly stated that the failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes a review of the issue on appeal. *See, e.g., Parker v. BancorpSouth Bank*, 369 Ark. 300, 311, 253 S.W.3d 918, 925-26 (2007); *Morrison v. Jennings*, 328 Ark. 278, 284, 943 S.W.2d 559, 562 (1997).

Petitioners' unconstitutional takings claim was not pressed for decision by the trial court. App. 11-23. The trial court noted "[t]he only issues before the Court in this Motion for Summary Judgment are whether the original tax deeds are void under Arkansas Law and whether the court should retroactively apply Ark. Code Ann. 26-26-1112." App. 20. Petitioners are correct in that the takings issue was mentioned to the Arkansas Court of Appeals by Petitioners' brief; however, because the Petitioners failed to obtain a ruling from the trial court on the issues, the issue was not properly raised for review by the Arkansas Court of Appeals. App. 8.

For the "pressed and passed upon" rule to be satisfied, the Arkansas Court of Appeals must have been apprised of the Petitioners' federal claim in the manner required by Arkansas law. *See Webb*, *supra* 451 U.S. at 501. This, Petitioners did not do. Petitioners' presentation to the Arkansas Supreme Court was even more deficient. The takings issue is not

mentioned, and Petitioners merely asserted the decisions of the Arkansas courts created "an unconstitutional violation of the separation of powers doctrine." Resp. App. 3. As the federal "separation of powers doctrine" is not applicable to the States, *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902), Petitioners' reference was to Arkansas' separation of powers doctrine. Petitioners' Petition for Review to the Arkansas Supreme Court does not even mention the federal issue upon which their Petition for Writ of Certiorari is based.

Petitioners assert their federal claim is properly before this Court citing *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___, 2010 WL 2400086 (2010), hereinafter "*Stop the Beach*." Petition at 5, footnote 1. However, there is a clear distinction between the procedural history of *Stop the Beach* and this case.

Petitioners in *Stop the Beach* sought rehearing before the Florida Supreme Court on grounds that the Florida court's decision effected a taking in violation of petitioners' Fifth and Fourteenth Amendment rights. ___ S.Ct. ___, 2010 WL 2400086 at 7. After the Florida Supreme Court denied the request for rehearing, the petitioners requested this Court grant certiorari on the same constitutional grounds – violation of the Fifth and Fourteenth Amendments. *Id.* at 1.

In contrast, here, Petitioners' Petition for Review to the Arkansas Supreme Court did not present an

issue of unconstitutional taking in violation of the Fifth and Fourteenth Amendments; but rather, Petitioners sought review by the Arkansas Supreme Court on the grounds that the lower courts' rulings effectuated an "unconstitutional violation of the separation of powers doctrine." Resp. App. 3. Unlike the Florida Supreme Court in *Stop the Beach*, the Arkansas Supreme Court was never given the opportunity to address whether the trial court's or the Arkansas Court of Appeals' ruling unconstitutionally divested Petitioners of their property in violation of the Fifth and Fourteenth Amendments.

Petitioners consistently have failed to properly present their purported Fifth and Fourteenth Amendments claim to the Arkansas courts. Petitioners' request for a writ of certiorari does not meet either prong of the "pressed or passed upon below" rule. Because Petitioners' claim of Federal Constitution violation was not properly presented to and was not decided by the Arkansas courts, this Court should decline to review Petitioners' claim.

B. Petitioners failed to comply with Supreme Court Rule 14(1)(g)(i).

Because Petitioners seek review of a state-court judgment, Supreme Court Rule 14(1)(g)(i) requires the petition to provide:

> [S]pecification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal

> questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and the pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears, so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Petitioners have failed to specify when the federal question at issue was raised, how Petitioners raised the federal question at the state-court level and how the state courts decided the question. Further, Petitioners fail to provide this Court with pertinent quotations or summaries of specific portions of the record in which Petitioners' federal claim appears. Instead, Petitioners make the blanket assertion that, "[t]hese constitutional issues were raised by Petitioners in their briefs to the trial court and the Arkansas Court of Appeals." Petition at 5, footnote 1. Petitioners also broadly state that the trial court's opinion was "challenged on constitutional grounds asserted herein." Petition at 5. Other than generally alluding to Petitioners' "briefs" to the trial court and the Arkansas Court of Appeals, Petitioners fail to reference any specific portions of the record which would indicate the manner and method of presenting the federal question.

Petitioners fail to address the way in which the Arkansas Court of Appeals or the trial court passed

upon Petitioners' federal question. Petitioners merely assert that both the trial court and the Arkansas Court of Appeals followed precedent of the Arkansas Supreme Court. Petition at 4. Petitioners' failure to reference specific portions of the trial court's ruling addressing the federal question is understandable because no such address exists. Petitioners did not obtain a ruling from the trial judge on the takings issue. App. 8 and 20. Likewise, the Arkansas Court of Appeals never decided Petitioners' unconstitutional taking argument as it had not been preserved for review. App. 8.

Petitioners utterly fail to reference the record to show how their takings issue was timely and properly raised to the Arkansas Supreme Court. As noted earlier, their Petition for Review to the Arkansas Supreme Court merely refers to a separation of powers doctrine issue. Resp. App. 3.

Petitioners have failed to comply with Rule 14(1)(g)(i) of this Court by not specifically referencing in the record where and how the Arkansas courts were presented and decided the federal question at issue. This Court should deny review of the Petition for Writ of Certiorari for failure to comply with Supreme Court Rule 14.

II. THE ARKANSAS COURTS CORRECTLY HELD THE TAX SALE DEED RELIED ON BY PETITIONERS TO BE VOID BASED UPON SETTLED ARKANSAS JURISPRUDENCE. THERE HAS BEEN NO JUDICIAL TAKING.

Petitioners claim ownership of severed mineral interests in Van Buren County, Arkansas, through a 1973 tax deed acquired by their predecessor in interest. App. 19. The Arkansas courts correctly adhered to more than five decades of consistent Arkansas case law in holding that tax deed void because the county assessor did not properly subjoin the severed mineral assessments to the corresponding surface assessments. The Arkansas Court of Appeals did not err or effectuate a judicial taking when it affirmed the trial court's ruling.

Petitioners assert the 1973 tax sale deed created a property right which was taken from them in 1983 and 1984 when the Arkansas Supreme Court decided *Garvan v. Potlach Corp.*, 278 Ark. 414, 645 S.W.2d 957 (1983) and *Dawdy v. Holt*, 281 Ark. 171, 662 S.W.2d 818 (1984). Petitioners assert *Garvan* and *Dawdy* changed Arkansas law, for the first time, to make tax deeds void based upon tax procedures where assessments of severed mineral interests were not subjoined to the corresponding surface interest assessments. Petition at 3, 5, 8, 9, 14 and 15. Petitioners assert the taking was accomplished in this case when the Arkansas Court of Appeals relied on *Garvan* and *Dawdy* to uphold the trial court's

decision that Petitioners' tax sale deed was void. Petition at 11-13.

In support of this argument, Petitioners rely heavily on a recent case of this Court, namely *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, ___ S.Ct. ___, 2010 WL2400086 (2010), hereinafter "*Stop the Beach*." Petitioners' reliance on *Stop the Beach* is misplaced. It and the other cases cited by Petitioners are clearly distinguishable from the facts of this case.

In *Stop the Beach*, a plurality of this Court concluded that the Takings Clause is not addressed to the action of a specific branch of government. *Id.* at 8. The Takings Clause is concerned with the act, not the governmental actor. *Id.* Therefore, a judicial taking has occurred if, as a result of a court's decision, an established right of property no longer exists. *Id.* at 10. An essential factor in deciding if a judicial taking has occurred is whether the property right allegedly taken is an "established right of property." *Stop the Beach*, ___ S.Ct. ___, 2010 WL2400086 at 21, footnote 9. If there is doubt about a property right's existence, then the property right is not "established." *Id.* Likewise, under a judicial takings analysis, the court's decision must actually contravene the complaining party's established property right so that, if the decision merely clarifies or elaborates upon property issues which before were unclear, the court cannot be said to have taken an established property right. *Id.* at 22.

Petitioners' reliance on *Stop the Beach* fails because Petitioners' 1973 tax deed was void under Arkansas law that long predates the 1973 tax deed as well as the 1983-1984 decisions in *Garvan* and *Dawdy*, which, at best from Petitioners' perspective, merely clarified the subjoinder principle in Arkansas law.

The subjoinder rule of Arkansas law was not created by *Garvan* or *Dawdy* in the 1980s. Rather, those decisions merely affirmed and clarified the subjoinder principle which had been established since the 1950s. For pre-1970's cases, *see Sorkin v. Myers*, 216 Ark. 908, 227 S.W.2d 958 (1950); *Schuman v. Ouachita County*, 218 Ark. 46, 234 S.W.2d 42 (1950); *Davis v. Stonecipher*, 218 Ark. 962, 239 S.W.2d 756 (1951); *Stienbarger v. Keever*, 219 Ark. 411, 242 S.W.2d 713 (1951); *Smiley v. Thomas*, 220 Ark. 116, 246 S.W.2d 419 (1952). For post-1970's and pre-*Garvan* and *Dawdy* cases, *see Adams v. Bruder*, 275 Ark. 19, 627 S.W.2d 12 (1982); *Hurst v. Rice*, 278 Ark. 94, 643 S.W.2d 563 (1982); *Walker v. Western Gas Co.*, 5 Ark. App. 226, 635 S.W.2d 1 (1982).

In 1950, in *Sorkin,* the Arkansas Supreme Court interpreted the Arkansas assessment statutes to require subjoinder of severed mineral assessments to the corresponding surface assessments. There, the Court stated:

> The minerals, being primarily an interest in the land, are severable only because the legislative authority has made them so; yet

> for taxing purposes they are so closely related to the realty that ownership identification and accuracy make it well-nigh imperative that the mineral listings be subjoined to the land assessments. Any method that destroys this unilateral relationship burdens ready determination when an owner seeks information respecting the status of his interest at a given time.

Sorkin, 216 Ark. at 912, 227 S.W.2d at 960.

The statutory requirement for subjoinder was reiterated by the Arkansas Supreme Court, again in 1950, in *Schuman*. There, the Arkansas Supreme Court stated, "[in *Sorkin* w]e held that the statutes require that mineral interests to be subjoined to the assessment of the corresponding surface ownerships . . . " *Schuman*, 218 Ark. at 47, 234 S.W.2d at 43. Likewise, in *Stienbarger*, in 1951, the Arkansas Supreme Court, in referring to the facts of *Sorkin* and *Davis*, stated, "[i]n those cases it was shown that severed mineral interests were listed . . . in a separate book . . . instead of being subjoined to the corresponding surface ownerships. . . ." 219 Ark. at 412, 242 S.W.2d at 713. In 1982, pre-*Garvan* and *Dawdy*, the Arkansas Supreme Court again stated that assessments for mineral interests must be subjoined to the corresponding surface estates. *Hurst*, 278. Ark. at 98, 643 S.W.2d at 565 (*citing Adams v. Bruder, supra*).

Pre-*Garvan* and *Dawdy*, the Arkansas Court of Appeals stated:

> The law in Arkansas has long been established that for a valid mineral assessment the mineral estate listing must be subjoined to the surface estate. *Adams v. Bruder, supra*; *Sorkin v. Myers*, 216 Ark. 908, 227 S.W.2d 958 (1950). Here, the mineral rights were improperly listed and the original tax sale was void.

Walker, 5 Ark. App. at 228-29, 635 S.W.2d at 2.

It is evident, from the express language of *Sorkin, Schuman*, and *Stienbarger*, the subjoinder requirement was an established rule of Arkansas law long before the 1973 tax sale deed. *Adams*, *Hurst* and *Walker* clearly demonstrate that the subjoinder requirement pre-dated and was not invented in *Garvan* and *Dawdy*. Petitioners' claim that *Garvan* and *Dawdy* created new law and effectuated a taking of Petitioners' property fails. Petitioners' 1973 tax deed was void under then established Arkansas law and, thus, it created no established property right subject to being taken.

The Arkansas Court of Appeals' application of *Garvan* and *Dawdy* did not divest Petitioners of any property because Petitioners never had an established property right under Arkansas law. The tax deed, through which Petitioners claim title, was void because it was based upon an improper tax assessment. Petitioners argue "that it was not until" *Garvan*

and *Dawdy* in 1983 and 1984, respectively, that the *Sorkin* line of cases was transformed into a new rule not required by the case law or statutes at the time the Petitioners obtained their interest in the severed minerals. Petition at 8-9. This foregoing review of the pre-*Garvan* and *Dawdy* cases demonstrates that Petitioners are wrong.

In an attempt to bolster their argument that *Garvan* and *Dawdy* created a new principle of Arkansas law, Petitioners assert the rulings of *Sorkin* and its progeny are based upon landowners' due process rights because alphabetical listings of mineral assessments deprived landowners of notice. Petition at 6-9. The Arkansas Supreme Court's ruling in *Sorkin* was not based upon a due process rationale but rather was based upon the Court's interpretation of Arkansas' assessment statutes. In *Sorkin*, the Court stated, "our decision in all of the cases rests upon the proposition that the procedure legislatively intended was not followed. Instead, there was a course of well-intentioned conduct that deprived the property owners of the process provided for assessing and selling." 216 Ark. at 913, 227 S.W.2d at 961. The statutory process basis for the subjoinder requirement was again expressed in *Schuman*. There, the court held, " . . . that the statutes require mineral interests to be subjoined to the assessment of the corresponding surface ownerships. . . ." *Schuman*, 218 Ark. at 47, 234 S.W.2d at 43. In *Adams*, the court reiterated that the subjoinder principle was based upon the fact that

legislatively intended procedure was not followed. 275 Ark. at 22, 627 S.W.2d at 13.

Particularly notable is a 1958 law review article discussing tax forfeiture problems in title examination in Arkansas. *See O.B. Core, Tax Forfeiture Problems in the Examination of Abstracts*, 12 Ark. L. Rev. 333, 338-39 (1959). The article discusses a title examination problem identified as "mineral rights only have been forfeited for non-payment of taxes and the redemption period has expired." Noting that the Arkansas Supreme Court had ruled alphabetically listed assessment to be void, the article continues:

> Some assessors arrange the description in this separate mineral book or separate mineral section of the tax books to follow the same outline of the organization of the surface, that is, beginning with the NE 1/4 of the NE 1/4 of section 1 and continuing across to the left and down. However, this procedure, while a little more usable, is void also. The Supreme Court has repeatedly stated that the only way to assess minerals is by subjoining them to the surface assessments.

Id. at p. 338.

Note, again, that this Arkansas Law Review article was published in 1958, long before Petitioners' predecessors' tax sale deed and even longer before *Garvan* and *Dawdy*. *Garvan* and *Dawdy* did nothing more than affirm and clarify the established principle of subjoinder. For example, *Garvan* provided a

definition of subjoinder. 278 Ark. at 416, 645 S.W.2d at 958. Lawyer Core in his 1958 article noted that the "Supreme Court has not as yet specifically clarified . . . just what mechanics is meant by the term 'subjoining.' The most liberal interpretation of the term would seem to be that the mineral description should follow immediately after the surface description." 12 Ark. L. Rev., *supra* at 338-39. Twenty-five years later, the Arkansas Supreme Court provided the clarifying definition. No unconstitutional taking is effectuated by clarifying an existing legal principle. *Stop the Beach*, ___ S.Ct. ___, 2010 WL2400086 at 22.

Petitioners also rely upon *Hughes v. Washington*, 389 U.S. 290 (1967) and *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), reversed on procedural grounds, 477 U.S. 902 (1986). Petition at 15-16. Both cases are distinguished from the situation here by the established nature of the involved properties in *Hughes* and *Robinson* as compared to lack of property interest here.

Hughes involved the established common law right of owners of property bordering the ocean to any acreations gradually built up by the ocean, an established right which was taken away by the 1889 Constitution of the State of Washington as interpreted by the Washington Supreme Court. *Hughes*, 389 U.S. at 291. *Robinson* involved a decision of the Supreme Court of Hawaii to overrule prior caselaw and declare for the first time, after more than a century of different law, the common law doctrine of riparian ownership to be the law of Hawaii. *Robinson*,

753 F.2d at 1474. Established, vested rights were changed by judicial decisions in *Hughes* and *Robinson*. In contrast, here, Petitioners' claim of an ownership right, based upon a void tax sale deed, was not an established right. Rather, established Arkansas law made the attempted deed void, and the decisions of the Arkansas courts in this case correctly affirmed the invalidity of the Petitioners' claim.

When there is doubt about a property right's existence it cannot be termed an established property right, and this Court will accept the determination of the state court regarding the established nature of the asserted property right. *See Stop the Beach*, ___ S.Ct. ___, 2010 WL2400086 at 21, footnote 9. As verified by the Arkansas authorities cited *supra*, in Arkansas, tax sale titles of severed mineral interests where tax assessments of the severed interest were not subjoined to the surface interest were void long before Petitioners' predecessor acquired the 1973 tax deed and even longer before *Garvan* and *Dawdy*.

CONCLUSION

Interestingly, while Petitioners assert a judicial taking of their property without due process, Petitioners' claimed property is a tax sale title that most surely would fail under the due process requirements announced in *Jones v. Flowers*, 547 U.S. 220 (2006). As noted *supra* at page 1, the *Jones v. Flowers* issue

was not reached by the summary judgment proceeding below and remains an additional defense.

Regardless, Respondent respectfully suggests the Petition for Writ of Certiorari should be denied. Petitioners did not sufficiently present to and obtain decisions by the Arkansas courts to satisfy the policy bases for the "not pressed or passed upon below" rule. Neither did Petitioners comply with Supreme Court Rule 14.

Moreover, there was no judicial taking accomplished by the 1983 and 1984 decisions of the Arkansas Supreme Court in *Garvan* and *Dawdy*. The Arkansas requirement of subjoinder of severed mineral interest tax assessments with corresponding surface assessments was established law, reflected both by judicial decisions and legal commentary, long before the attempted tax sale deed in 1973 and even longer before *Garvan* and *Dawdy*.

For all these reasons, Respondent, SEECO, Inc., respectfully requests that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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IN THE ARKANSAS SUPREME COURT

SELRAHC LIMITED PARTNERSHIP and KATINA ROYE PEEVYHOUSE (formerly known as KATINA R. ROYE) **APPELLANTS**

v. **CASE NO. _____**

SEECO, INC., et al. **APPELLEES**

Arkansas Court of Appeals Case No. CA-09-00240

Appeal From the Van Buren County Circuit Court
Honorable Rhonda K. Wood, Circuit Judge

APPELLANT'S PETITION FOR REVIEW

The Appellants, Selrahc Limited Partnership, and Katina Roye Peevyhouse, petitions this Honorable Court for review of the decision of the Arkansas Court of Appeals in the case styled Selrahc Limited Partnership and Katina Roye Peevyhouse (formerly known as Katina A. Roye) v. SEECO, Inc., et al., Case No. CA-09-378 (Div. III), opinion delivered December 16, 2009, for the following reasons:

1. The Court of Appeals erred with respect to multiple grounds listed in Rule 1-2(b), to wit:

   a) Significant issues needing clarification or development of the law or overruling precedent (Rule 1-2(b)(5));

> b) Appeals involving substantial questions of law concerning the validity, construction, or interpretation of an act of the General Assembly . . . (Rule 1-2(b)(6)).

2. The Court of Appeals erroneously held that it was "confronted with the same situation in which we found ourselves when we decided *Blackburn v. Cline*, 8 Ark. App. 108, 650 S.W.2d 588 (1983). As in *Blackburn*, we affirm the Circuit Court." (Court of Appeals Opinion, p. 1). This case is clearly different from the situation existing at the time of the *Blackburn* opinion because of the passage of Act 961 of 1985, now codified as A.C.A. § 26-26-1112. In *Blackburn*, the Court of Appeals expressly stated that it was bound by this Court's decision of *Garvan v. Potlatch Corporation*, 278 Ark. 414, 645 S.W.2d 957 (1983). *Blackburn*, 8 Ark. App. at 110-11 650 S.W.2d 590. Importantly, however, *Garvan* was legislatively overruled by the passage of Act 961 of 1985. In this case, the Court of Appeals failed to recognize that it is not *now* bound by this Court's decision in *Garvan*.

3. The Court of Appeals further erred in holding that it was bound by this Court's decision in *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992), concerning the application of A.C.A. § 26-26-1112. Importantly, the appellant in *Gilbreath* never argued for the application of such statute, and therefore the issue was never properly developed nor adequately discussed by this Honorable Court in *Gilbreath*.

4. This Court should accept the review of this case in order to properly develop and clarify the law as it pertains to tax deeds which clearly met the requirements of applicable statutes, and were not truly rendered invalid by this Court's opinions discussing the judicial rule of "subjoinder" prior to *Garvan v. Potlatch Corporation* or *Dawdy v. Holt*, 281 Ark. 171, 662 S.W.2d 818 (1984). Because the *Garvan* and *Dawdy* decisions were effectively overruled by Act 961 of 1985, any decision now failing to give effect to such statute creates an unconstitutional violation of the separation of powers doctrine. The Court of Appeals opinion, and the opinion of the Circuit Court are therefore unconstitutional. Consequently, the additional grounds listed in Rule 1-2(b) are implicated:

c) Issues of first impression (Rule 1-2(b)(1));

d) Issues of substantial public interest (Rule 1-2(b)(4)); and

e) Issued involving federal constitutional interpretation (Rule 1-2(b)(3)).

5. In sum, the Court of Appeals decision in this case improperly gave "new life" to this Court's opinions in *Garvan* and *Dawdy*, which were clearly intended to be "overruled" by the legislature through the passage of Act 961 of 1985. Unfortunately, the appellant in *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992) did not brief this Court on the application of such statute, depriving the Court of the opportunity for fair and full consideration of the

issue. This case presents the Court with such opportunity.

RESPECTFULLY SUBMITTED,
SELRAHC, Limited Partnership;
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KATINA R. ROYE); *Plaintiffs*

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CERTIFICATE OF MERIT

The undersigned, Joe D. Byars, Jr., does hereby certify that this Petition for Review is believed, in good faith, to present arguments of substantial merit and is not filed for the purpose of delay.

/s/ Joe D. Byars, Jr.
JOE D. BYARS, JR.

[Certificate Of Service Omitted In Printing]

IN THE ARKANSAS SUPREME COURT

SELRAHC LIMITED PARTNERSHIP and
KATINA R. PEEVYHOUSE, f/k/a
KATINA R. ROYE APPELLANTS

Case No. 09-00378

SEECO, INC. et al. APPELLEE

APPEAL FROM THE
VAN BUREN COUNTY CIRCUIT COURT
CIVIL DIVISION

THE HONORABLE RHONDA K. WOOD
CIRCUIT JUDGE

SUPPLEMENTAL ABSTRACT AND BRIEF OF APPELLEE SEECO, INC.

(Filed Jul. 8, 2009)

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* * *

"effect of invalidating titles that were acquired in reliance upon the rule to question." *Eubanks v. McDonald*, 225 Ark. 470, 472, 283 S.W.2d 166 (1955). Oil and gas have been produced, and royalties have been paid, for many years, all in reliance upon the rule of property challenged here. O. B. Core, *Tax Forfeiture Problems in the Examination of Abstracts*, 12 Ark. L. Rev. 333, 338 (1958). That rule should not now be disturbed.

B. Appellants' Failure to Develop Constitutional Issues at the Trial Level, As Well As, Appellants' Failure to Obtain Rulings on Any Such Constitutional Issues, Precludes Review on Appeal.

Arkansas law is clear that it is Appellants' burden to present a case before the trial court that fully and completely develops all issues. *Rounsaville v. State*, 372 Ark. 252, 258-59, 273 S.W.3d 486 (2008); *Eastin v. State*, 370 Ark. 10, 16-18, 257 S.W.3d 58 (2007); *Raymond v. State*, 354 Ark. 157, 162-68, 118 S.W.3d 567 (2003). More particularly, this Court has explicitly stated that "constitutional arguments must be raised and fully developed in the trial court." *Raymond*, 354 Ark. at 162.

Moreover, it is Appellants' burden to obtain a clear ruling on any and all issues from the trial court, and questions left unresolved are waived and may not be relied upon on appeal. *Misskelley v. State*, 323 Ark. 449, 471, 915 S.W.2d 702, *cert. denied*, 519 U.S. 898.

117 S.Ct. 246, 136 L.Ed.2d 174 (1996); *Bowen v. State*, 322 Ark. 483, 502, 505, 911 S.W.2d 555 (1995), *cert. denied*, 517 U.S. 1226, 116 S.Ct. 1861, 134 L.Ed.2d 960 (1996). This Court has stated repeatedly that the failure to obtain a ruling on an issue at the trial court level, including a constitutional issue, precludes a review of the issue on appeal. *Parker v. BancorpSouth Bank*, 369 Ark. 300, 311, 253 S.W.3d 918 (2007); *Morrison v. Jennings*, 328 Ark. 278, 284, 943 S.W.2d 559 (1997).

Even assuming that constitutional issues were adequately raised by Appellants in their written pleadings at the trial level, such constitutional issues were not developed, either factually or legally, in any subsequent pleadings or at the hearing on the Summary Judgment Motion. At best, it may be said that Appellants referred to constitutional issues in their original Petition, ¶ 34, Add. 23, and in their Response in Opposition to the subject Motion for Summary Judgment, pp. 16-17, Add. 186-87. However, such constitutional issues were not developed, either factually or legally.

Critically, as the transcript reflects, none of Appellants' constitutional issues were raised at the summary judgment hearing, at which the trial court carefully considered each issue presented, one at a time. Add. 363-85. As reflected at Add. 375-76, and as noted by the mineral owner Appellees at Arg. 2 of their Brief, Appellants advised the trial court that the involved issues were limited to (1) distinguishing

prior subjoinder cases and (2) a contention for retroactive application of Act 961 of 1985.

This is hardly sufficient, under Arkansas law, to be considered full and complete development of any constitutional issue. *See Rounsaville*, 372 Ark. at 258-59; *Raymond*, 354 Ark. at 162-68.

Moreover, Appellants failed to obtain a ruling from the trial court on constitutional issues. As a result, neither the trial court's Final Judgment or Order for Summary Judgment contain any ruling on constitutional issues. Add. 5-12. Such issues are waived and may not be relied upon on appeal.

* * *